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April 8, 2009

Office of Administrative Law
Reference Attorney
300 Capitol Mall, Suite 1250
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Dear Reference Attorney:

I am writing in regard to the Proposed Emergency Regulations submitted April 3, 2009, by the California Secretary of State regarding the Post Election Manual Tally (PEMT).

I am the elected County Clerk-Recorder-Assessor for the County of Sonoma, and as such, serve as the Registrar of Voters. I have administered elections in Sonoma County for over 30 years and I am currently serving as a member of the Secretary of State's PEMT Working Group. I am commenting on my own behalf, and not for other members of the PEMT Working Group.

Sonoma County was not covered by the PEMT requirements prior to the adoption of the Emergency Regulations in October of 2008. The ballot counting system used in Sonoma County, BC-Win, produced by DFM Associates, was not reviewed in the Secretary of State's Top to Bottom Review, and therefore was not decertified and recertified with conditions.

In October, 2008, as a result of the approval of the PEMT Emergency Regulations, Sonoma County was included in the counties covered by the PEMT. The timing of the 2008 filing left little, if any, time for county election officials to respond to the ramifications of the Proposed Emergency Regulations, as the preparation for the Presidential Election, a monumental task by any standards, was in full swing. More voters were registered, and more votes were cast in the 2008 Presidential Election than ever before in the history of the State. Seven contests in the November, 2008, election in Sonoma County were impacted by the PEMT.

I wish to take issue with three assertions made in filing for the extension of the PEMT Regulations – 1) No emergency exists. 2) The PEMT is fatally flawed. 3) The estimated potential costs of the PEMT are grossly understated.

1) No emergency exists. California counties have been conducting accurate and fair elections on the same equipment that is currently certified for use in California for many years. Prior to each election, ballot counting equipment is thoroughly tested to ensure it is tabulating votes accurately.

Following each election, the machine tally of votes cast is verified by a manual tally of one percent of the precincts, selected at random, plus one precinct for every contest not covered in the one percent (Elections Code Section 15360). This manual tally is conducted based on election night results and differs from a recount, in that the votes are interpreted as the counting equipment is designed to “read” them, with no consideration given to voter intent. The sole purpose of this tally is to verify that the equipment is counting as designed. Any error in, or manipulation of, the ballot counting program, would become obvious during the testing or verification process.

Counties using Direct Recording Electronic Devices (DRE’s) have also had results verified by Parallel Monitoring, conducted by the Secretary of State. Parallel Monitoring is the testing of a randomly selected sample of voting equipment, designed to simulate actual election conditions to confirm that the system is registering votes accurately. Ballot counting equipment in California cannot be connected to the internet, nor is the equipment networked from county to county. The only vulnerability comes into play when individuals are given unfettered access to the equipment – and then, as stated above, the manipulation would be evident by the controls already in place by statute.

The Secretary cites concerns regarding electronic voting, including uncertified and flawed software – however, conditions attached to the re-certification of electronic voting systems by the Secretary require a 100% hand tally of all ballots cast and tabulated on the electronic equipment. Therefore, these concerns should not be relevant to the Post Election Manual Tally.

Errors can occur in any ballot tabulation system – including, and perhaps most frequently – in hand tallying ballots. And while a level of verification is appropriate, it is imperative that the level of verification and associated costs be weighed against the need and outcome. Historically there have been four levels of verification in California, pre-election testing, the one percent manual tally to verify that the tabulation system is counting votes as designed, the post-certification recount in the event a close contest is called into question, in which voter error and intent is taken into consideration, and the election contest if the outcome is questioned due to irregularities. These methods have served us well, and the current movement towards blurring the clear and distinct lines between these procedures is cause for concern, costly and unnecessary.

There is no evidence that these Proposed Emergency Regulations are necessary to avoid serious harm to the public peace, health, safety or general welfare.

2) The PEMT is fatally flawed. Following the November, 2008, General Election the Secretary of State’s Office called to verify the seven contests identified in Sonoma County as falling within the scope of the PEMT Regulations, based on election night results. The Secretary states that “the PEMT Emergency Regulations were successfully implemented by 41 counties in which close contests triggered their use following the November 4, 2008 General Election.” While Sonoma County attempted diligently to follow the Emergency Regulations, I would hardly categorize the experience of attempting to implement the Emergency Regulations as “successful.”

The regulations are convoluted and unclear. There were problems trying to logically interpret them, and they were obviously not drafted by anyone with hands-on experience in election administration. The current and proposed Regulations allow the precinct(s) tallied under the one percent manual tally (E.C. 15360) to be counted as part of the 10% PEMT, however, voter intent is not considered in the one percent manual tally, and there was confusion as to whether voter intent was to be considered as a variance in the PEMT. I spoke with election officials from other jurisdictions and found different interpretations of the terms used, particularly in regard to discrepancies and variances.

Another issue in regard to discrepancies is that the voting system used in Sonoma County requires ballots to be marked with a #2 lead pencil or non-reflective ink. Votes marked with reflective ink, or other devices are not detected by the ballot counting equipment, and are therefore not counted in the election night tally; however, they clearly show in the manual tally, and will be counted during the official canvass when card readers are set to pause on "blank" ballots. As a result, the tally teams did not know whether to count these discrepancies as variances or not, because they would be corrected when the ballots were re-tabulated in the Official Canvass.

Due to the number of jurisdictions falling under the PEMT, plus the sheer number of contests requiring the statutory one percent manual tally, there was a lapse between the time the PEMT 10% tallies took place and the time the data entry was done in order to determine whether escalation was necessary. During that lapse, other aspects of the official canvass were proceeding, and additional vote by mail and provisional ballots were interfiled into the election night ballots, making recounts of ballots impossible. There were no instructions for completing the optional spreadsheet distributed by the Secretary of State for use with the PEMT. Staff, myself included, spent hours entering data and attempting to identify and reconcile differences.

On the 28th day after the election, the deadline for completing the Official Canvass, I determined we had completed the PEMT to the best of our ability. At this point, all ballots had been tabulated, and ballots voted with reflective ink or other devices had been corrected, so that the votes would be properly counted. We had hand tallied 38 precincts for the PEMT, in addition to those counted in the one percent manual tally, at a cost of over \$16,000 (\$425 per precinct). As I understand it, at least one county was not able to complete the PEMT along with all other duties required in a canvass, prior to the statutory deadline for completing the Official Canvass. That county certified the election without completing the PEMT, and continued the PEMT after certification.

As a result of our frustrating experience in attempting to implement the Emergency Regulations, I was appreciative of having been asked to serve as a member of the PEMT Working Group assembled by the Secretary of State. Prior to the first meeting held by conference call on January 14, 2009, I gave the subject considerable thought. My goal, as a member of the PEMT Working Group, and as an election administrator with over 30 years experience conducting elections, was to provide input to the Secretary and her staff that would result in successful, logical, practical and workable Regulations. In order to achieve this goal, I considered it imperative that we, the members of the Working group, have a clear understanding of the objective of the PEMT. Other members of the Group agreed, and the question was posed to staff during the first conference call. We were advised that the question would be conveyed to the Secretary, but, in the meantime, we were to continue to work with staff to discuss issues and make clarifications, which we have done. However, without the clear objective of the PEMT, we were not able to suggest substantive changes.

On February 27, 2009, after having received no response to our initial question, and following three consecutive cancelled meetings of the PEMT, five members of the working group sent a letter (attached) to the Secretary setting forth our concerns and the need for the objective. We have yet to receive a reply.

Without knowing the objective of the PEMT, it is impossible to address the issues. The PEMT claims to be necessary "to confirm the correctness of the results reported by voting systems particularly in contests in which the apparent margin of victory is quite small." However, the PEMT is required to be conducted using election night results, containing only a percentage of the ballots cast – therefore there is no "margin of victory," as all of the ballots have not yet been tallied, and no person or vote is victorious. Quite frequently contests that are very close on election night are not so by the final canvass,

and vice-versa. Therefore, many staff hours and taxpayer dollars could be spent hand tallying ballots for contests that are not close, or even reverse by a significant margin by the time all ballots are counted. Further, the PEMT does not change vote counts. If a candidate or vote on a measure that was shown in the lead on election night was not so shown during the PEMT, the remainder of the ballots would have to be counted to determine whether or not the reversal held, and if so, a recount would be necessary in order to change the election results.

As stated in the letter to the Secretary, if the purpose of the PEMT is to verify that the voting equipment is counting votes as designed, a hand tally of a statistical sampling of election night totals is adequate, voter intent should not be considered, and the closeness of a contest should be of no concern. If the current percentage of ballots hand tallied pursuant to Elections Code Section 15360 is not sufficient, it is suggested that statisticians be employed to determine a correct percentage. However, if the purpose of the PEMT is to ensure that the outcome of the election is accurate in close contests, it is only logical that all ballots cast must be considered in determining whether or not a contest falls within the percentage vote spread requiring the PEMT, and voter intent must be considered. These are very different and separate issues, and it remains my position that both objectives cannot be attained using the same methodology.

3) The estimated potential costs of the PEMT are grossly understated. The Secretary has estimated the costs of the extension of the Emergency Regulations as \$20,000 - \$680,000. The high end of the estimate is based on the cost of complying with the Emergency Regulations in November, 2008. This figure is grossly understated for the following reasons:

1) Only 31 of the 41 counties that were affected by the PEMT responded to the questionnaire concerning the costs of the PEMT. This is not to say that the counties that did not respond to the questionnaire did not incur costs, nor that they would not pursue reimbursement from the state when available. San Francisco just recently calculated costs for complying with the Regulations in the November, 2008, General Election. Those costs exceeded \$68,000 – over and above the \$680,000 reported by the other counties. There are nine other counties whose costs are currently unknown. Santa Clara County did not fall under the PEMT, because the definition of “margin of victory” for measures did not anticipate measures requiring anything other than a simple majority vote. This has been remedied in the Proposed Regulations. Had this definition been in play in the November 2008 election, the costs of a PEMT for a county wide measure in Santa Clara County would have been significant. Further, it should be noted that, as this was a local election, the percentage of ballots to be hand-tallied was not reduced at all in the Proposed Regulations.

2) The estimate takes into account only a single Statewide election. The Emergency Regulations apply to all elections conducted in the state, including local elections. No funds have been identified for the costs of any local elections that may be held during the time period. The City of Los Angeles’ regular municipal election, the 26th Senate District and 32nd Congressional District Special Vacancy Elections, as well as many local elections are scheduled to be held May 19, 2009, and there are many other elections, both scheduled, and not yet scheduled, for the six month period covered by the Emergency Regulations.

3) There is no way to determine in advance which or how many contests may fall under the provisions of the PEMT. On May 19, 2009, six statewide propositions will appear on the ballot, in addition to numerous local elections. Any or all of these elections could fall under the PEMT requirements. If just one special statewide proposition falls within the PEMT percentage, the potential costs are \$10,000,000.

It is not just the 2% hand tally, it is the escalation that must be considered in estimating potential costs. The Secretary states that the counties may seek reimbursement for the cost of the special statewide election from the Legislature. While counties are hopeful, based on language in the Governor's signing message, that the State will reimburse counties for the cost of the special statewide election, the Legislature is under no legal obligation to do so, as there is no reimbursement language in the bill calling the election, and under current law, costs of State elections are costs to the counties. Further, one wonders if the Legislature would be as inclined to agree to cover these costs if they were aware of the potential for an additional cost of \$10,000,000 per statewide measure, over and above the cost the election itself.

4) The Secretary explains that costs will be reduced in future elections because of the reduced sample sizes and reduced escalation requirement in the revised Regulations; however, nowhere is it mentioned that due to the addition of a definition of a variance, (§20121 (d) of the Proposed Emergency Regulations), as well as the clarification of the definition of "margin of victory" in the case of a measure (20122 (a) 3) of the Proposed Emergency Regulations) costs could actually increase significantly.

The definition of what constitutes a variance is an important and needed component to the PEMT; however, the definition provided includes "machine malfunction, operator error, or voter error in marking a ballot." Therefore, voter intent will be taken into account in examining the ballots for purpose of the PEMT. Despite the fact the Emergency Regulations continue to allow the practice, this definition eliminates the ability to consider precincts counted in the one percent manual tally as part of the PEMT, as voter intent is not considered in the one percent manual tally. Further, it will result in a significant increase in the number of variances than were considered in the previous version of the Emergency Regulations. This increase in the number of variances has the potential to drastically increase the probability of escalation.

For example, in a machine count, if a voter marks his/her choice in a manner that cannot be read by the machine, the machine will consider this to be an undervote, but in a hand tally the voter's mark would have to be interpreted as a vote, resulting in a variance. (Interestingly, the Regulations do not appear to address the situation in which a voter marks his/her choice, then changes his/her mind, crosses out the first vote and marks another choice, which, in a contest where the voter may choose only one, the machine would see as an overvote.) And, while the escalation requirement has been reduced, due to an increase in the allowable variance percentage, (from one tenth of the "margin of victory" to one half of the "margin of victory") the additional variances due to the inclusion of voter intent will undoubtedly more than negate any savings that would occur as a result thereof.

Because the costs of the original Emergency Regulations were estimated at only \$20,000 statewide, there are no funds in the State's current year budget to reimburse counties for the costs already incurred, let alone the additional costs that will be generated should this extension be approved. The Secretary has indicated that funding will be requested in the 2009-2010 State Budget; however, no approval from the Department of Finance has been included with the application as required by Government Code Section 11349.1(d)(3). *(The office shall return any regulation subject to this chapter to the adopting agency if any of the following occur: The adopting agency has prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5, the estimate indicates that the regulation will result in a cost to local agencies or school districts that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, and the adopting agency fails to do any of the following: (C) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has approved a request by the agency that funds be included in the Budget Bill for the next*

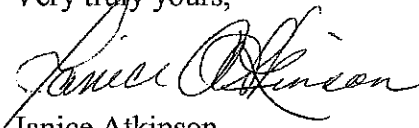
following fiscal year to reimburse local agencies or school districts for the costs mandated by the regulation.) I did notice a contradiction in reviewing the OAL Checklist Emergency APA Rulemaking between the above note, which appears on page 6 in the section regarding Local Mandate and a note on the following page in the section regarding Fiscal Impact wherein it states that no DoF concurrence is required for Emergency Regulations. Since the form is specifically designed for Emergency Regulations, the contradiction makes no sense. Further, in these difficult budgetary times, described by the Secretary as a “multi-billion dollar state budget crisis,” it is incongruous that a state agency can impose significant costs on counties and on the state with no oversight and no guarantee of funding.

Conclusion. I have every interest in continuing to work with the Secretary of State, and her staff, as a member of the Post Election Manual Tally Working Group, to devise Regulations to affect a successful, logical, practical and workable PEMT. I am disheartened that the Secretary chose not to include reference to the Post Election Manual Tally Working Group in this most recent submission of the request for extension of the Emergency Regulations. This Group of election officials has worked diligently with her staff to attempt to identify and rectify issues with the Regulations. We are not opposed to increasing levels of verification – but have many practical, logistical and budgetary issues with the Proposed Regulations based on our hands on experience in administering elections. I would hope that the Secretary would take advantage of the years of experience in election administration represented on this Group. Some of us are elected, others are appointed, but we are all committed to ensuring fair and accurate elections.

Finally, the Secretary cites her interest and duty to “limit the risk of certifying false outcomes in very narrow contests” however, as the Proposed Regulations are based on election night results and cannot change results, that goal is not accomplished – instead, precious taxpayer dollars are spent hand tallying contests that, when all ballots are counted, might not even be close. In light of the fact no emergency exists, the Proposed Regulations are flawed in their design, and sufficient funding has not been provided, I would respectfully request that the application for an extension of the Emergency Regulations regarding the Post Election Manual Tally not be approved.

Thank you for your consideration of my comments. Should you have any questions in this regard, please feel free to contact me at 707-565-1876 or jatkinso@sonoma-county.org.

Very truly yours,



Janice Atkinson,
Clerk-Recorder-Assessor
Registrar of Voters
County of Sonoma

February 27, 2009

Honorable Debra Bowen
Secretary of State
1500 11th Street
Sacramento, CA 95814

Dear Secretary Bowen:

In light of your statements concerning the status of the Post Election Manual Tally (PEMT) made during last week's conference call, (specifically, your intent to have information out to counties within the next couple of weeks), we, as individual members of the PEMT Working Group feel it is imperative that we share with you our concerns. While we do not speak for the PEMT Working Group as a whole, we, the undersigned, have a growing level of uneasiness regarding the level of progress made to date in revising the PEMT regulations, and certainly with the cancellation of the last three scheduled PEMT conference calls.

We sincerely appreciate the opportunity to work with you and your staff in an attempt to refine the objectives and methodology of the Post Election Manual Tally. We consider providing the practical and logistical challenges of complying with the proposed regulations to be our top priority. Jennie Bretschneider has done an admirable job of listening to our concerns and carrying them back for consideration. We feel confident that there is now a greater understanding of the issues surrounding the emergency regulations, and we understand that some compromise is under consideration. To that end, some degree of progress has been made; however, at this advanced stage into the process we do not believe that the primary issue, that of defining the objective of the PEMT, has been addressed. On the very first conference call, election officials agreed that without defining the objective, it was impossible to develop a meaningful and workable solution.

Instead, two objectives were presented in regard to the PEMT – those being: 1) verifying that the voting equipment is counting votes as designed; and 2) ensuring that the outcome of the election is accurate in close contests. These are very different and separate issues, and it is our position that both objectives cannot be attained using the same methodology.

The first objective can be achieved by hand tallying a statistical sampling of the machine tallied votes (interpreting the marks as would the machine), and comparing the results of the two counts. This can be done using election night results and as such, is the intent of the current 1% (plus) manual tally statute. The percentage by which a contest is decided should have no bearing on this verification procedure. We readily concede that we do not have the expertise to determine whether the current verification levels are sufficient, but we note that the number of precincts exceeds 1% due to the long-standing requirement to add precincts for any contests not included in the original drawing. In addition, new legislation which became effective in 2007 requires elections officials to include mail ballots as well as polls ballots. For most counties, this has effectively doubled the number of ballots included in the 1% manual tally.

The second objective requires a much different approach. First, it is imperative that final, certified results be considered. Election night results bear little resemblance to final results, and many contests that are close on election night, have distinct margins at the final canvass. Conversely, some contests that are not considered close on election night, narrow the margins by the official canvass, and could benefit by a closer look at the ballots cast. This is particularly

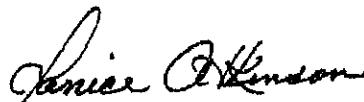
Honorable Debra Bowen, Secretary of State
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true in the case of multi-county contests which can only be considered when all jurisdictions' votes have been reported. This objective is best achieved by a post canvass automatic recount for contests within a certain percentage of difference of votes cast (adjusted of course for varying percentages required for passage). An automatic recount would take into account voter intent, which is not recognized in the verification of the voting system tally. Perhaps statisticians should be consulted to determine whether a statistical sampling is sufficient, or whether a full, automatic recount is required to verify the accuracy of the vote count.

We have tried to make clear that it is not possible to achieve both objectives employing the same methodology. Further, regardless of the objective(s) to be achieved, it must be recognized that there is a significant cost to either or both, depending on the size of the jurisdiction(s) of the contest(s) under scrutiny and the percentage of ballots to be tallied. In these difficult financial times, it is impossible for counties to absorb these costs without state reimbursement – and, in light of recent state positions concerning reimbursement of prior state mandates, we feel it is only appropriate that we apprise you of our opposition to additional unfunded mandates.

Thank you for your consideration of our concerns. Again, we appreciate the opportunity to work with you and your staff in this regard. If you have any questions in this regard please feel free to contact any of the members of the PEMT Working Group listed below.

Very truly yours,



Janice Atkinson
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